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In the Supreme Court of the United States

OCTOBER TERM, 1967

INTERSTATE COMMERCE COMMISSION, APPELLANT

v.

FRISCO TRANSPORTATION COMPANY, APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI—EASTERN DIVISION

JURISDICTIONAL STATEMENT

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December 8, 1967

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OPINIONS BELOW

The opinions (both majority and dissenting) of the United States District Court for the Eastern District of Missouri are reported at 153 F. Supp. 572, and are set forth in Appendix A to this Statement. The reports of the Interstate Commerce Commission are printed at 53 M. C. C. 415 (Report of Division 5) and 62 M. C. C. 367 (Report of entire Commission).[1]

[1] The Commission's report is reproduced as Appendix C in No. 636, *American Trucking Association, Inc., et al.* v. *Frisco Transportation Company*, and as Appendix D in No. 637, *Railway Labor Executives Association, et al.* v. *Frisco Transportation Company.*

JURISDICTION

The action was brought under 28 U. S. C. 1336 to set aside an order of the Interstate Commerce Commission. The judgment and findings and conclusions of the district court (attached as Appendix B) were entered on August 12, 1957, and notice of appeal was filed in that court by the Commission on October 10, 1957.

The jurisdiction of this Court to review the decision of the district court on direct appeal is conferred by 28 U. S. C. 1253 and 2101 (b), and is sustained by the following decisions: *United States* v. *Rock Island Co.*, 340 U. S. 419, and *United States* v. *Texas & Pacific Co.*, 340 U. S. 450

STATUTE INVOLVED

The pertinent provisions of the Interstate Commerce Act are set forth in Appendix C.

QUESTIONS PRESENTED

Pursuant to what is now Section 5 (2) of the Interstate Commerce Act, the Commission authorized the wholly-owned subsidiary of a railroad to purchase the operating rights of several motor carriers. Each of the Commission's reports authorizing such purchases stated that its approval was "subject to such further limitations, restrictions, or modifications as the Commission may hereafter find necessary to impose, in order to insure that the service shall be auxiliary or supplementary to the train service of the railroad and shall not unduly restrain compe-

tition." Thereafter, the Commission issued to such subsidiary motor carrier certificates of public convenience and necessity which did not contain this reservation of power to impose restrictions. The questions presented are—

1. Whether the Commission was empowered, after notice and hearing, to modify the certificates to include such restrictions in accordance with the reservations in its reports.

2. Whether the District Court erred in holding that the omission of the reservation from the certificates was the result of a change in the Commission's policy rather than of inadvertence or clerical error.

STATEMENT

Appellee, a wholly-owned subsidiary of the St. Louis-San Francisco Railway Company, obtained its initial motor carrier operating authority in 1939 by purchasing, with Commission approval, the operating rights of existing motor carriers. Although in each of the Commission proceedings here involved appellee has indicated its desire to perform not only a coordinated rail-truck service but also an all-motor carrier service independent of the railroad, the Commission stated in each report that its approval of the purchase was "subject to such further limitations, restrictions, or modifications as the Commission may hereafter find necessary to impose, in order to insure that the service shall be auxiliary or supplementary to the train service of the railroad and shall not unduly restrain competition."

Appellee took no exception to the reports, but notified[2] the Commission that it would consummate the approved purchases subject to the terms prescribed by the Commission. Appellee commenced operations within approximately 30 days of the date of each report. Thereafter, so-called "compliance orders"[3] were issued indicating the authority to which appellee was entitled as a result of the purchase transactions. In the preparation of these compliance orders, the Commission's Section of Certificates omitted the above-quoted reservation as prescribed in the Commission's reports. The certificates (issued beginning March 31, 1942) prepared from those compliance orders likewise omitted such reservations.

Prior to the issuance of the certificates, several motor carriers filed a formal complaint with the Commission alleging that appellee was performing a motor carrier service independent of the rail service. A hearing was held upon that complaint,[4] and resulted

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[2] The notifications were by letters which were filed in the correspondence section of the official record in each of the finance proceedings. They were submitted to the court as part of the record. The court held the correspondence not to be admissible but stated that consideration of the correspondence would not change the decision. (Conclusion of Law No. 18.)

[3] A preliminary order directing the issuance of the certificate upon compliance by the carrier within a stated period of time with statutory and regulatory requirements as to security for the protection of the public and publication of tariffs. See *Crescent Express Lines* v. *United States*, 320 U. S. 401, 404, fn. 2.

[4] The Commission reports on the hearing are reported as *Campbell Sixty-Six Express, Inc.* v. *Frisco Trans. Co.*, 43 M. C. C. 641 and 46 M. C. C. 222.

in the reopening of the purchase proceedings for the purpose of determining what, if any, specific conditions or restrictions should be imposed to remove all doubt concerning the character of the motor carrier operations which appellee was authorized to perform.

In the reopened proceedings, after a hearing, the Commission concluded that the unrestricted certificates had been inadvertently issued, and that it had the power to correct them. The Commission accordingly ordered the issuance of new certificates containing appropriate restrictions similar to those considered by this Court in *United States* v. *Rock Island Co.*, 340 U. S. 419, 425–426. The Commission was of the view that the certificate issued in each of the purchase proceedings could not ignore or eliminate any condition prescribed in the report except following a formal supplemental report, a report on reconsideration, or a modifying order in the specific proceeding authorizing the purchase. The Commission stated (62 M. C. C., at 374–375):

> It would neither be fair nor equitable to the parties to the proceeding or to the general public to permit any such change other than in the manner specified. There has not been any type of report or order modifying the findings in any of the finance proceedings * * *. The compliance order issued in each of the five proceedings sets forth the operating rights which the Transportation Company had been authorized to purchase, and in each instance omitted the limitation. In other words, each of the compliance orders and of necessity the certificates based thereon authorized operations greater than those

for the performance of which the division authorized the purchase.

We conclude that the certificates in each of the five proceedings, being based upon the findings in the finance proceedings, may not authorize operations greater than those for the performance of which the division authorized the purchase. To the extent that the certificates issued fail to reflect the character of authority granted by the findings, such deficiency or deviation from the findings was inadvertent and consequently the certificates, departing as they do from the findings in the finance reports, were inadvertently issued. Under these circumstances the certificates may be revoked, and certificates in accord with such findings issued, without proceeding in accordance with the provisions of section 212 (a). No diminution of any authority actually authorized to be purchased, nor any partial revocation of any such authority, is involved.

The lower court, relying solely upon *Watson Bros. Transp. Co.* v. *United States*, 132 F. Supp. 905, affd. 350 U. S. 927, held that the Commission's action was an attempt to revoke a duly issued certificate contrary to Section 212 (a) of the Interstate Commerce Act (49 U. S. C. 312 (a)), and that the failure to include the reservation of power in the original certificate was not the result of clerical error. The court stated (153 F. Supp. 578):

We are of the opinion that the four certificates cannot be cancelled as a result of the hearing conducted by the Commission since it was

not conducted under Section 212 of the Act * * *.

District Judge Moore, dissenting, stated that the *Watson* case was not controlling in a case involving a railroad-affiliated motor carrier because this Court had expressly reserved the question in the *Rock Island* case, *supra*. Judge Moore was also of the view that this Court's summary affirmance in the *Watson* case was not on the inadvertence issue but rather on the lack of notice and hearing in that case. He was also convinced that the omission of the reservation from the initial certificate was, in fact, a clerical error.

THE QUESTIONS ARE SUBSTANTIAL

This case presents the important question of whether the Interstate Commerce Commission is empowered, after notice and hearing, to modify a motor carrier certificate of public convenience and necessity held by a rail affiliate so as to restrict its motor carrier operations to service auxiliary and supplementary to the rail service, where power to impose such restrictions was reserved in the Commission's report but was omitted from the certificate through inadvertence or clerical error. The question assumes particular importance here because the reservation involved was intended to enable the Commission to implement the purpose of the proviso in Section 5 (2) (b) to prevent railroad domination of motor transportation.

1. The court below held that the Commission's action in imposing such restrictions upon Frisco's motor carrier operations in accordance with a reservation stated in its reports but not in the certificates, constituted an

unauthorized revocation of the certificates in violation of Section 212 (a). We contend, to the contrary, that the Commission has power to correct or modify a certificate of public convenience and necessity to conform it to findings and conditions in the Commission's report which were the basis for the issuance of the certificate. Such a power is essential to fulfillment of the objectives of the Interstate Commerce Act, and in fairness to private parties.

At the time of the Commission's approval of the purchase transaction here involved, a proviso in Section 213 of the Motor Carrier Act (transferred by the Transportation Act of 1940 to Section 5 (2) (b) of the Interstate Commerce Act) provided that where a railroad, or its affiliate, sought to acquire a motor carrier, the Commission must find that such acquisition "will enable such [railroad] to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition."

As we pointed out in the Commission's brief in *American Trucking Association et al.* v. *United States et al.*, Nos. 6 and 8, now awaiting decision by this Court, the Commission has long held that, in the absence of unusual circumstances, motor carrier operations acquired by a railroad, or its affiliate, must be restricted to service which is auxiliary and supplemental to the rail service. The Commission's power to impose such restrictions was sustained by this Court in *United States* v. *Rock Island Motor Transit Co., supra.*

In the instant case, the reservation of power to impose auxiliary and supplementary restrictions upon

Frisco's motor carrier operations was designed to implement this statutory policy. The Commission's power to reserve the right to impose such conditions in the future, and thereafter to impose them, was also upheld by this Court in the *Rock Island* case.

Thus the Commission does not have an unrestricted power to authorize railroads and their affiliates to purchase motor carriers. Rather, in the proviso of Section 5 (2) (b), Congress has imposed affirmative requirements to prevent railroad monopolization of motor transportation. Neither the Commission nor the carriers may ignore these requirements or those of the National Transportation Policy. Similarly, we submit that this important Congressional policy is not revoked *pro tanto* by the omission of the reservation in question from Frisco's certificates, particularly where the Commission's reports gave notice of its purpose to Frisco.

We have no doubt that if the Commission had refused deliberately to give any weight to the policy of Section 5 (2) (b), its order would be set aside by the courts. Where the same result follows from inadvertence or clerical error in the preparation and issuance of certificates, the Commission should be permitted to modify such a certificate in accordance with a reservation of power to do so which was stated specifically in its report.

Moreover, fairness to competing carriers and other private parties requires that the Commission be empowered to correct errors in a certificate to conform it to the Commission's findings. Such a power is included in the broad command of Section 17 (3)

of the Act (made applicable to Part II by Section 205 (h)) that "The Commission shall conduct its proceedings under any provision of law in such manner as will best conduce to the proper dispatch of business and to the ends of justice."

The practical necessity for such a power is emphasized by the fact that the Commission's report and order are served upon competing carriers and other parties to the proceeding before the Commission, while the subsequent certificate is sent only to the applicant. As the Commission states in its report, it would neither be fair nor equitable to the parties to the proceeding or to the general public to permit a material deviation from the findings in the report except through a formal supplementary report, a report on reconsideration, or a modifying order in the specific proceeding authorizing the purchase, 62 M. C. C., at 374, and with notice to all parties. In determining whether to seek judicial review of the Commission's action, such parties are entitled to assume that the certificate will not be broader than the findings and conditions in the Commission's report and order. Conversely, such modification of a certificate is not unfair to the holder, because the Commission's report gave full notice of its purpose from the beginning. With such notice, neither expenditures nor other purported reliance upon the terms of a certificate can give rise to an estoppel against the Commission or a denial of due process to the certificate holder. *United States* v. *Rock Island Motor Transit Co.*, 340 U. S., at 449.

We submit that the majority of the court below erred in concluding that the question is controlled by *Watson Bros. Transportation Co.* v. *United States*, 132 F. Supp. 905, summarily affirmed 350 U. S. 927. That case involved not only the question whether the Commission could correct an error in a certificate but also whether it could do so without giving notice and an opportunity for a hearing to the certificate holder. Thus, the affirmance by this Court did not necessarily deny to the Commission power to correct such errors where, as in the instant case, a hearing was held before modification of the certificate.

In *United States* v. *Seatrain Lines*, 329 U. S. 424, 428, this Court found it unnecessary to "determine the Commission's statutory power to correct clerical mistakes" in certificates. However, the holding in that case that there was no inadvertence or clerical error in the issuance of that certificate, is not controlling here where, unlike the *Seatrain* case, the Commission's report made clear its purpose to reserve power to modify the certificate. Moreover, this circumstance probably distinguishes the instant case from the question expressly reserved by this Court in the *Rock Island* case as follows (340 U. S., at 445–446):

> * * * This leaves unanswered the question of the power of the Commission to modify a railroad-affiliated motor carrier's certificate so as to make its operation auxiliary to and supplemental of the rail service, when no reservation for or restriction to that effect has been placed in the order directing the issue of the certificate or the certificate itself. If any such pro-

> cedure should be undertaken by the Commission, that answer should await a fully developed statement and argument by the interests affected. * * *.

That case involved in part the Commission's approval of the rail affiliate's purchase of the Frederickson motor carrier operating rights. There, neither the report nor order of the Commission authorizing the purchase referred to a reservation of power to impose auxiliary and supplemental conditions, and the Commission's action in imposing such conditions was sustained solely on the ground that a certificate had not been issued. Where a certificate has been issued without any notice of the Commission's purpose to impose future conditions, a later imposition of such conditions would present problems not present in the instant case.

2. The court below concluded that "no clerical error exists," and that "What the Commission is trying to do is limit the four certificates in line with the present policy of the Commission and use a claimed clerical error that does not exist to justify such." We submit that this conclusion is wholly untenable in view of the fact, as found by the Commission (53 M. C. C. at 424–425) that the physical preparation of certificates (and the issuance of compliance orders) is a routine function performed by subordinate employees of the Commission and not reviewed by the entire Commission or by a Division.

Any suggestion that the Commission deliberately ordered the issuance of certificates inconsistent with the findings and conditions in its reports is without sup-

port in the record and impeaches the integrity of the Commission's reports as the necessary basis for its orders. See *Florida* v. *United States*, 282 U. S. 194, and Section 8 (b) of the Administrative Procedure Act (5 U. S. C. 1007 (b)).

3. So far as we know, such errors in the issuance of certificates have been relatively few in number. However, the *Watson* case and the instant case show that they can occur in fairly important cases. In view of the wide range of Federal licensing activities, it is generally important to establish that Federal agencies have power to correct such inadvertent or clerical errors, such as the Federal courts possess under Rule 60 (a) of the Federal Rules of Civil Procedure.

CONCLUSION

For the reasons stated, we believe that the questions presented by this appeal are substantial and are of such public importance as to require plenary consideration, with briefs and oral argument, for their resolution.

Respectfully submitted.

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Interstate Commerce Commission,
Washington 25, D. C.

APPENDIX A

In the United States District Court for the Eastern District of Missouri, Eastern Division

No. 10272 (1)

FRISCO TRANSPORTATION COMPANY, A CORPORATION, PLAINTIFF

v.

UNITED STATES OF AMERICA, and INTERSTATE COMMERCE COMMISSION ET AL., DEFENDANTS

Memorandum Opinion

Before VAN OOSTERHOUT, *Circuit Judge*, MOORE and HARPER, *District Judges*

Appearances:

John E. McCullough, Ernest D. Grinnell, Jr., A. J. Baumann, St. Louis, Missouri, appeared on behalf of the plaintiff, Frisco Transportation Company, a corporation.

Wayne H. Bigler, Asst. U. S. Attorney, St. Louis, Missouri, and Maurice A. Fitzgerald, Attorney, Department of Justice, Washington, D. C., appeared on behalf of the United States of America, defendant.

C. H. Johns, Asst. General Counsel, Interstate Commerce Commission, Washington, D. C., and Wayne H. Bigler, Asst. U. S. Attorney, St. Louis, Missouri, appeared on behalf of the Interstate Commerce Commission, defendant.

B. W. LaTourrette, St. Louis, Missouri, appeared on behalf of Viking Freight Company, Be-Mac Trans-

portation Company, C. E. S. Truck Lines, and L. A. Tucker Truck Lines, intervenors.

Peter T. Beardsley, Washington, D. C., appeared on behalf of American Trucking Association, Inc., and its Regular Common Carrier Conference, intervenors.

Carroll J. Donohue, St. Louis, Missouri, and James L. Highsaw, Washington, D. C., appeared on behalf of Railway Labor Executives Association, intervenors.

Wentworth E. Griffin, Kansas City, Missouri, appeared on behalf of Campbell "66" Express, intervenor.

HARPER, *Judge:*

This is an action by the Frisco Transportation Company, a wholly owned subsidiary of the St. Louis-San Francisco Railway Company, to enjoin, set aside, suspend and annul an order of the Interstate Commerce Commission entered on December 7, 1953, which order purports to cancel certain certificates, and at the same time new or amended certificates would be issued.

This court has jurisdiction of the subject matter of this action, 28 U. S. C. A. Sec. 1326, and the case was heard by a court composed of three judges pursuant to Sections 2321–2325, 28 U. S. C. A.

At issue in this proceeding is the propriety of the cancellation and reissue in restricted form of five operating certificates authorizing motor carrier operation by plaintiff in areas adjacent to those served by the Frisco Railroad. The Commission contends that four of these certificates issued in the year 1942 were incomplete in form in that they failed to include, due to a clerical error, a reservation of the power to restrict the operations of plaintiff by imposing limita-

tions designed to insure that plaintiff's motor carrier service would be auxiliary and supplemental to the parent company's rail service, the necessity and propriety of such reservations of power having been determined in the finance hearings conducted when plaintiff sought to purchase truck routes from those then operating them. Plaintiff denies that such certificates were in fact issued with an inadvertent omission of the reservation of power previously determined necessary, and asserts further that, even should this be the case, the Commission is without power to correct them at this time, its power in this respect being limited by Sec. 212 (a) of the Interstate Commerce Act, 49 U. S. C. A., Sec. 312 (a).

With respect to the fifth certificate (Bennett), the plaintiff asserts that the Commission is without power to restrict its operation.

Under consideration in the original hearings of 1938 and 1939 and in the reopened Commission proceedings beginning in 1945, which resulted in this action being brought, were six truck routes identified before us by the name of the vendor from whom purchase was authorized. These are the "Cooper" route from Joplin, Missouri, to Carthage, Missouri; the "Hamm" route from Joplin, Missouri, to Miami, Oklahoma; the "Tolson" route from Walnut Ridge, Arkansas, to Memphis, Tennessee; the "Parker" route from Blytheville, Arkansas, to Memphis, Tennessee; the "Rose" route from Hugo, Oklahoma, to Paris, Texas; and the "Bennett" route from Blytheville, Arkansas, to Lake City, Arkansas. In its reconsideration of the "Rose" certificate the Commission ordered no change. The operating certificate for the "Bennett" route was issued in 1940 with the recital of a reservation of power to impose additional restrictions on the scope of activities permitted under

the certificate, and hence, under the rule of *United States* v. *Rock Island Motor Transit Co.*, 340 U. S. 419, rehearing denied 341 U. S. 906, there can be little question of the power of the Commission to impose the restrictions which it has incorporated in the amended Bennett certificate. These restrictions are as follows:

1. The service to be performed by the Frisco Transportation Company, hereinafter called the Transportation Company, shall be limited to service which is auxiliary to, or supplemental of, the train service of the St. Louis-San Francisco Railway Company, hereinafter called the Railway, except that this condition shall not apply with respect to Dyess, Ark.

2. The Transportation Company shall not render any service to or from any point not a station on a rail line of the railway, except that this condition shall not apply with respect to Dyess, Ark.

3. No shipments shall be transported by the Transportation Company between any of the following points, or through, or to, or from more than one of said points: Kansas City, Springfield, Joplin, St. Louis, Willow Springs, Cape Girardeau-Jackson-Chaffee (considered as one), Mo., Tulsa, Okla., Blytheville, Ark., Memphis, Tenn., and Amery-Tupelo (considered as one), Miss.

4. All contractual arrangements between the Transportation Company and the Railway shall be reported to the Commission and shall be subject to revision if and as it finds necessary in order that such arrangements shall be fair and equitable to the parties.

5. Such further specific conditions as in the future the Commission may find necessary to impose in order to insure that the service shall be auxiliary to, or supplemental of, the train service of the railway.

Determination of the propriety of the change made in the four remaining certificates requires a somewhat more detailed examination of the administrative history of the certificates which plaintiff seeks to retain unaltered. In 1938 and 1939, finance hearings were held by an examiner for the Commission with regard to the acquisition of truck routes by plaintiff, organized in 1937, to provide co-ordinated rail-motor carrier service. After the finance hearings on these four acquisitions the examiner made his report approving acquisition by plaintiff of the routes, but in each case concluded his report with the following language:

> * * * Provided, however, that the authority herein granted is subject to such further limitations or restrictions as the Commission may hereinafter find it necessary to impose in order to insure that the service shall be auxiliary or supplementary to the train service of the said Railway Company and shall not unduly restrain competition.

Following the finance hearings, Division 5 of the Interstate Commerce Commission approved and adopted the report of the Hearing Examiner, with one commissioner dissenting. Following the action by Division 5 of the Commission, the plaintiff completed the purchase, and operations were commenced by the plaintiff in early 1939, and have continued without change as to the nature of or without interruption to the present time.

Thereafter, in June and July of 1939, compliance orders were issued by Division 5 of the Commission with respect to the four routes in question. The compliance orders do not contain the limitations contained in the findings in each of the finance proceed-

ings. In 1942, certificates were issued by the Commission to the plaintiff with respect to each of the four routes, which certificates do not contain the limitations contained in the findings in each of the finance proceedings.

In July 1941, before the issuance of the certificates under consideration, competing motor carriers filed complaints with the Commission alleging that plaintiff was operating a motor carrier service independent of parent Railway's rail service and in contravention of the condition imposed by the Commission in the finance hearings. Proceedings were had by the Commission to inquire into these complaints, and the Commission in 1946 concluded that plaintiff was not operating in violation of the terms of its certificates. The Commission indicated, however, that the ruling should not be taken as sanctioning such operation, since the proceedings pursuant to which the certificates in question were issued to the plaintiff had in fact already been re-opened for further hearing. The Commission had started these hearings in 1945, in Division 5, and Division 5 held that the operating certificates had been issued with an inadvertent omission of the proviso set out in the report of the finance hearings, and directed the cancellation and re-issue of the certificates.

Upon a petition for reconsideration presented to the full Commission, the matter was reheard by it in November 1952. A report of the Commission issued in December 1953, upheld the action of Division 5 in incorporating the restrictions in the operating certificates, in a divided opinion, four commissioners dissenting and one not participating. A petition for reconsideration was denied by the Commission in April 1955, and this action was commenced a month later.

A three-judge court, in *Watson Bros. Transportation Co.* v. *U. S.*, 132 F. Supp. 905 (Affirmed 350 U. S. 927), said, 1. c. 909:

> Counsel for the Commission argues that the order of August 25, 1953, merely corrects a clerical error in the certificate of July 19, 1949. Even if the court were to assume that the Commission has authority to correct clerical errors without notice and hearing, the result in this case would not be different, because it is the holding of the court that the order of August 25, 1953, is more than the mere correction of a clerical error; and is an attempt made contrary to Section 212 to revoke and change a certificate duly issued.

The court in the above language clearly indicates that certificates duly issued cannot be modified in the manner sought to be modified in the case before us, even though some prior report of the Commission indicates to the contrary. This is clearly borne out by the dissenting opinion of Judge Johnsen in that case, wherein he said, 1. c. 909–10:

> The effect of the majority opinion is to hold that, where the Commission has defined the scope of public convenience and necessity existing in a particular situation, by a finding such as the statute requires, but it has in some manner issued a certificate in excess of or contrary to the limits of the public convenience and necessity so found, it can not call in the certificate or engage in any correction or reissuance thereof, in order to make the certificate conform to its finding, unless it grants the holder a hearing.

The case before us with respect to the four certificates in question is a much stronger case on the part of the plaintiff insofar as the facts are concerned than the *Watson Bros.* case. Here intervening between the issuance of the finance report and the cer-

tificates in question, was issuance by the Commission of compliance orders, which did not contain the limitation contained in the findings in the finance proceedings. The action of the Commission in adopting the finance hearing report was not unanimous. Between the time that the compliance orders were issued and the four certificates were issued, a certificate was granted with respect to the Bennett route, in which the limitations were imposed. Thereafter, and before the certificates were issued by the Commission, proceedings were instituted by competing motor carriers, complaining that the restrictions set up in the finance hearing report were applicable and that the plaintiff was operating in contravention of those conditions.

After all of these things had occurred the four certificates in question were issued. We must bear in mind that insofar as the Commission is concerned, that the words "auxiliary to" or "supplemental of" are not taken from the Act as set forth in the *Rock Island* case, supra. At pages 433–34, the court said:

> But power in the Commission, before issuance of a certificate or approval of acquisition, to limit railroad motor operations so as to make them auxiliary and supplemental to rail service does not necessarily imply power to change the conditions designed to bring about the desired coordination, after issuance of the certificate. The parent railroad may have acquired or developed its motor affiliate in reliance on the conditions stated in the certificate.

The Commission in *Smith Bros. Revocation of Certificate,* 33 M. C. C. 465, l. c. 472, said:

> We may issue decision upon decision and order upon order, on an application for a certificate so long as sufficient reason therefore appears and until all controversy is determined,

> but once a certificate, duly and regularly issued, becomes effective, our authority to terminate it is expressly marked off and limited. All the antecedent decisions and orders are essentially procedural in character, and may be set aside, modified, or vacated, but the certificate marks the end of the proceeding, just as the entry of a final judgment or decree marks the end of a court proceeding.

As was said by the Supreme Court in the *Rock Island* case, supra, l. c. 448:

> What slight bearing *Seatrain* has weighs on the side of the interlocutory character of the approval order. The sentence referred to reads;
>
> "But, as the Commission has said as to motor carrier certificates, while the procedural "orders" antecedent to a water carrier certificate can be modified from time to time, the certificate marks the end of that proceeding."

Under the *Watson Bros.* decision, the action of the Commission is an attempt made contrary to Section 212 to revoke and change a certificate duly issued, and is more than the mere correction of a clerical error.

While the above disposes of the case, we are further persuaded that no clerical error exists. The functions of the reviewing court are exhausted when there is found to be a rational basis for the conclusions approved by the administrative body. *Rochester Telephone Co.* v. *U. S.*, 307 U. S. 125; *Mississippi Valley Barge Line* v. *U. S.*, 292 U. S. 282.

In the *Mississippi Valley Barge Line* case, supra, l. c. 286–87, the Supreme Court said:

> The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body.

The courts, however, have held in reviewing administrative orders that the orders must be supported

by evidence. In *Lang Transportation Corporation* v. *U. S.*, 75 F. Supp. 915, l. c. 924, the court said:

> Orders of the Interstate Commerce Commission which are contrary to and without adequate support in the evidence are void and have been consistently set aside by the courts. [Citing *Eastern Central Motor Carriers Association* v. *U. S.*, 321 U. S. 194; *Florida* v. *U. S.*, 282 U. S. 194; *Baltimore & Ohio Railroad Company* v. *U. S.*, 264 U. S. 258, and a number of district court cases.]

In the instant case the four orders last referred to are without adequate support in the evidence. The history of the case we have set forth above clearly demonstrates that what was sought to be accomplished here, at this late date, was to restrict the operations of the plaintiff, not because a clerical error had occurred, but based upon the question of whether or not such was desired. A statement by Examiner Croft, at page 59 of the transcript of the hearing, bespeaks as much when he said during the hearing, before testimony was introduced:

> Well, it is my assumption that if the Commission finds that restrictions are desirable, and if it concludes that it has authority to impose them at this time, they will put in restrictions similar to the so-called Kansas City Southern restrictions, including the condition 3, naming either key points or requiring an immediately prior or immediately subsequent rail haul. * * * In other words, I want information on which we can impose a workable restriction.

Where does this indicate that the restrictions will be the result of correcting a clerical error or that the hearing is about a clerical error? The report of the finance hearing examiner as to the four routes was adopted by a divided division of the Commission with

one dissent. Who would say that the Commission is bound by the recommendations of the hearing examiner? The books are full of cases where the recommendations of the hearing examiners have not been followed, and yet the certificates are not the result of clerical errors. The Commission is not a rubber stamp for the conclusions of hearing examiners.

Months after the approval of the finance report by a divided division, compliance orders were issued for the four routes. Thereafter, a certificate was issued for the Bennett route containing restrictions. A complaint was filed by competing carriers, complaining that the plaintiff was ignoring the restrictions of the finance hearing report, but thereafter the four certificates were issued. In the face of all of this, the Commission would have us believe that the purported changes are made as the result of clerical error.

While, as set out above, under the *Watson Bros.* case we are of the opinion that the four certificates cannot be canceled as a result of the hearing conducted by the Commission since it was not conducted under Sec. 212 of the Act, yet, if we agreed with the dissenting opinion in the *Watson Bros.* case, we would still be of the opinion in this case that the four certificates in question could not be canceled and reissued because no clerical error in fact existed. We would not overrule the actions of the Commission taken at the time that the compliance orders were issued, and the certificates were issued merely because the hearing examiner at the finance hearings would have put limitations on the certificates. For us to hold that the members of the Interstate Commerce Commission are bound by the recommendation of a hearing examiner in his report, a report that was adopted by a divided division, would be to hold that the members of the Commission could not have minds of their own.

Clerical errors should be readily apparent. Such is not the case here. Four of the members of the Commission dissented and one took no part. Two of the commissioners wrote dissents setting out that in their opinion the record does not justify the finding of the majority of the Commission.

The arguments advanced here for the defense are the arguments of the minority opinion in the *Watson Bros.* case, supra. What the Commission is trying to do is limit the four certificates in line with the present policy of the Commission and use a claimed clerical error that does not exist to justify such.

Judgement will accordingly be for the plaintiff with respect to the "Cooper", "Hamm", "Tolson" and "Parker" routes, and the action of the Commission confirmed with respect to the "Bennett" route. Attorneys for the plaintiff will prepare the appropriate Findings of Fact, Conclusions of Law and Judgment, and present same to the court for entry.

M. D. VAN OOSTERHOUT,
United States Circuit Judge.

United States District Judge.
ROY W. HARPER,
United States District Judge.

MOORE, *Judge:*

Reluctantly, I must dissent from the opinion of the majority, believing as I do that the Interstate Commerce Commission acted correctly. After examining the record, I am persuaded that the omission of the proviso from the operating certificates (other than the "Bennett" certificate) was, in fact, a clerical error on the part of the Commission and not, as plaintiff alleges, the result of an intentional decision to reverse

the determination made at the finance hearings at which both plaintiff and competing carriers participated and offered evidence. The unrestricted compliance orders which are at variance with the finance hearings, determinations were made without any hearing at which intervenor motor carriers might have been heard. The intervening motor carriers and the defendant Commission did not sleep on their rights in this matter. Protests were filed with the Commission even before the operating certificates were issued. I think it is significant that rail-affiliated motor carrier applications for authority to offer motor-carrier services to the public were a distinct minority of the total number of motor carrier service authorizations sought in the 'thirties and the 'forties; no doubt those charged with the responsibility of issuing compliance orders and operating certificates found it easy to omit the proviso which was required on only a few of the motor carrier certificates with which the Section of Certificates dealt. I think it is also noteworthy that plaintiff did not file a petition for reconsideration after the conclusion of the finance hearings, as was its right under the procedural rules of the Commission (I. C. C. General Rules of Practice, 101 (a)).

I cannot see that Transportation Company's case would be any stronger if I were in fact persuaded that the omissions from the finance orders and certificates were intentional. I do not see how plaintiff could justify changes in the Commission's findings made without giving notice, or an opportunity to be heard to those appearing at the acquisition proceedings (49 U. S. C. A. Sec. 305 (a)).

I cannot accept the view of the majority that the *Watson Bros. Transportation Co.* case is controlling. The basis for my view is that the "power to modify" issue which the *Watson* case is supposed to have set-

tled was expressly reserved by the Supreme Court in the *Rock Island* case *supra*.

> This leaves unanswered the question of the power of the Commission to modify a railroad-affiliated motor carrier's certificate so as to make its operation auxiliary to and supplemental of the rail service, when no reservation for or restriction to that effect has been placed in the order directing the issue of the certificate or the certificate itself. If any such procedure should be undertaken by the Commission, that answer should await a fully developed statement and argument by the interests affected (340 U. S. 419, 445).

The decision of the three-judge court in that case was affirmed in the Supreme Court on motion. Rule 16–1 (c) of the Revised Rules of the Supreme Court provides:

> The Court will receive a motion to affirm a judgment sought to be reviewed on appeal from a federal court on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument (1954, 346 U. S. 951, 964).

The language of this rule persuades me that the Supreme Court did not affirm the decision below on this inadvertence issue, but rather on the lack of hearing and notice. I believe the section of the Interstate Commerce Commission Act, Sec. 212 (a), which plaintiff offers in support of its position, is intended to prevent the Commission from making changes in certificates when such certificates have been lawfully issued in accordance with previous findings of the Commission made after due notice and hearing. I do not think that, for example, if in these administrative proceedings the Section of Certificates had erroneously issued a certificate of authority to an intervenor motor

carrier instead of to Frisco Transportation Company that such a mistake would permanently tie the hands of the Commission and thus nullify the previous findings made in the prior administrative hearings. On the issue of due process raised by the plaintiff I shall say only that I do not believe anyone can acquire an indefeasible interest in a mistake. I see no good reason in the absence of any clear legislative mandate to hold that so powerful an administrative agency as the Interstate Commerce Commission is unable to correct the clerical errors made by a subordinate entity not empowered to vary the findings and decisions of its creator.

Dated this 28th day of June 1957.

(Signed) GEO. H. MOORE,
United States District Judge.

APPENDIX B

In the United States District Court for the Eastern Judicial District of Missouri—Eastern Division

Civil Action No. 10272 (1)

FRISCO TRANSPORTATION COMPANY, PLAINTIFF.

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS

Judgment

This cause came on for final hearing on the complaint herein, praying for a decree enjoining and restraining the United States and its agency, the Interstate Commerce Commission, from enforcing the order of the Interstate Commerce Commission entered on December 7, 1953, in a proceeding bearing the principal caption of MC 89913 Sub. No. 1, Frisco Transportation Company Extension—Joplin-Miami, and the chief judge of the United States Court of Appeals for the Eighth Circuit having called to the assistance of the Honorable George H. Moore, to hear and determine this cause, the Honorable Martin D. Van Oosterhout, Judge of the Court of Appeals for this Circuit, and the Honorable Roy W. Harper, Judge of the United States District Court for the Eastern District of Missouri, Eastern Division, pursuant to Section 2281 of Title 28 of the United States Code, and said cause and the evidence therein having been heard before said three judges, it is

Ordered, adjudged, and decreed that the United States of America and its agency, the Interstate Commerce Commission, be and they are hereby en-

joined from enforcing the second ordering paragraph of the Interstate Commerce Commission entered on December 7, 1953, in a proceeding bearing the principal caption MC–89913 Sub. No. 1, Frisco Transportation Company Extension—Joplin-Miami, and said second ordering paragraph is hereby forever set aside, suspended and annulled. The relief sought by plaintiff in connection with its certificate bearing No. MC–89913 (Sub. No. 10) is denied, and the Interstate Commerce Commission's Order with respect thereto is affirmed.

Dated August 9, 1957.

/s/ MARTIN D. VAN OOSTERHOUT,
United States Circuit Judge.

/s/ ROY W. HARPER,
United States District Judge.

GEORGE H. MOORE,
United States District Judge, dissenting.

In the United States District Court for the Eastern Judicial District of Missouri—Eastern Division

Civil Action No. 10272 (1)

FRISCO TRANSPORTATION COMPANY, PLAINTIFF

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS

Findings of Fact and Conclusions of Law

Findings of Fact

1. (*a*) Plaintiff, Frisco Transportation Company, is a corporation organized and existing under and by virtue of the laws of the State of Delaware, with its principal office and place of business in the City of St. Louis, Missouri.

(*b*) United States of America is named a defendant pursuant to Section 2322 of the Judicial Code, 28 U. S. C. A., Section 2322.

(*c*) The Interstate Commerce Commission intervened as a defendant in accordance with the provisions of Section 2323 of the Judicial Code, 28 U. S. C. A., Section 2323.

(*d*) Be-Mac Transport Company, Inc.; Viking Freight Company, C. E. S. Truck Lines, Inc.; L. A. Tucker Truck Lines, Inc.; Consolidated Forwarding Company, Inc.; American Trucking Associations, Inc. and its Regular Common Carrier Conference; Railway Labor Executives Association; Brotherhood of Railroad Trainmen; Order of Railway Conductors and Brakemen of America; and Campbell "Sixty-Six" Express, Inc. were allowed to intervene as parties defendant after the filing of appropriate petitions for leave to intervene.

2. Plaintiff is a common carrier by motor vehicle engaged in the transportation of persons and property in interstate and intrastate commerce, and is a wholly owned subsidiary of the St. Louis-San Fransisco Railway Company, a common carrier by rail subject to the Interstate Commerce Act.

3. In this suit we are asked to review an order of the Interstate Commerce Commission cancelling certain operating certificates of plaintiff bearing the numbers MC 89913 Sub. No. 1 (Hamm), MC 89913 Sub No. 3 (Cooper), MC 89913 Sub. No. 5 (Parker), MC 89913 Sub. No. 6 (Tolson), and requiring the issuance of new or amended certificates in lieu thereof. We are also asked to review the same order insofar as it modifies a certificate of plaintiff bearing number MC 89913 Sub. No. 10 (Bennett). The names in parentheses are the parties from whom plaintiff purchased the operating rights represented by these cer-

tificates. These names will some times be used in referring to the certificates in these findings and conclusions.

4. The proceedings before the Commission also involved plaintiff's certificate bearing number MC 89913 sub No. 2 (Rose), but since the Commission did not order any modification of that certificate, no action by this Court is necessary on the portion of the order dealing therewith. Therefore, the remaining findings of fact do not apply to that certificate.

5. On October 17, 1939, plaintiff filed an application to purchase a portion of the motor carrier operating rights and property of Bennett. After hearings were held, the Commission approved said purchase on March 15, 1940. A memorandum decision reporting this approval appears in 35 MCC 802. On June 13, 1940, the Commission granted plaintiff a certificate of public convenience and necessity bearing number MC 89913 Sub. No. 10, authorizing plaintiff to engage in interstate or foreign commerce as a common carrier by motor vehicle over the operating rights purchased from said Bennett, which said certificate contained the following:

> The operations herein authorized are subject to such further limitations, restrictions, or modifications as the Commission may hereafter find it necessary to impose, in order to insure that the service shall be auxiliary or supplementary to the train service of the St. Louis-San Francisco Railway Company, and shall not unduly restrain competition.

6. During the years 1938 and 1939, plaintiff filed applications to purchase the motor carrier operating rights and properties of Hamm, Cooper, Parker and Tolson. After finance hearings were held, Examiner's Proposed Reports were issued in connection with each of these applications, which Reports ap-

proved the purchase by plaintiff of the operating rights and properties of these motor carriers and concluded with the following language:

> * * * Provided, however, that the authority herein granted is subject to such further limitations or restrictions as the Commission may hereinafter find it necessary to impose in order to insure that the service shall be auxiliary or supplementary to the train service of the said Railway Company and shall not unduly restrain competition.

7. Division 5 of the Interstate Commerce Commission approved and adopted the Reports of the hearing Examiners, with one Commissioner dissenting in each case. These Reports appear as follows: Hamm—15 M. C. C. 320; Cooper—15 M. C. C. 317; Parker—25 M. C. C. 96; Tolson—25 M. C. C. 96.

8. Following the action by Division 5 of the Commission, plaintiff completed the purchases, and operations were commenced by the plaintiff in early 1939, and have continued without change as to the nature of or without interruption to the present time.

9. On March 11, 1939, the Commission, in recognition of the fact that plaintiff and its predecessor, Cooper, were on June 1, 1935, and continuously thereafter had been, in bona fide operation as a common carrier by motor vehicle in interstate and foreign commerce, issued its order (commonly referred to as a "compliance order") in Docket MC 89913 Sub. No. 3, which authorized the issuance to plaintiff of a certificate of public convenience and necessity to engage in interstate or foreign commerce as a common carrier by motor vehicle, covering operating authority previously applied for by Joseph D. Cooper, the purchase of which by plaintiff had been authorized, with no restrictions as to the type of motor common carrier service. On March 31, 1942, the Commission granted

to plaintiff a certificate of public convenience and necessity bearing number MC 89913 Sub. No. 3, including inter alia the operating rights purchased from Cooper, which certificate contained no restriction as to the type of motor common carrier service authorized thereunder.

10. On March 14, 1939, the Commission, in recognition of the fact that plaintiff and its predecessor, Hamm, were on June 1, 1935, and continuously thereafter had been, in bona fide operation as a common carrier by motor vehicle in interstate and foreign commerce, issued a compliance order in Docket MC 89913 Sub. No. 1, which authorized the issuance to plaintiff of a certificate of public convenience and necessity to engage in interstate or foreign commerce as a common carrier by motor vehicle, covering operating authority previously applied for by John Hamm, the purchase of which by plaintiff had been authorized, with no restrictions as to the type of motor common carrier service. On March 31, 1942, the Commission granted to plaintiff a certificate of public convenience and necessity bearing number MC 89913 Sub. No. 1, including inter alia the operating rights purchased from Hamm, which certificate contained no restriction as to the type of motor common carrier service authorized thereunder.

11. On June 16, 1939, the Commission, in recognition of the fact that plaintiff and its predecessor, Parker, were on June 1, 1935, and continuously thereafter had been, in bona fide operation as a common carrier by motor vehicle in interstate and foreign commerce, issued a compliance order in Docket MC 89913 Sub. No. 5, which authorized the issuance to plaintiff of a certificate of public convenience and necessity to engage in interstate or foreign commerce as a common carrier by motor vehicle, covering operating authority

previously applied for by Joseph W. Parker, the purchase of which by plaintiff had been authorized, with no restrictions as to the type of motor common carrier service. On April 18, 1942, the Commission granted to plaintiff a certificate of public convenience and necessity bearing number MC 89913 Sub. No. 5, including inter alia the operating rights purchased from Parker, which certificate contained no restriction as to the type of motor common carrier service authorized thereunder.

12. On July 10, 1939, the Commission, in recognition of the fact that plaintiff and its predecessor, Tolson, were on June 1, 1935, and continuously thereafter had been, in bona fide operation as a common carrier by motor vehicle in interstate and foreign commerce, issued a compliance order in Docket MC 89913 Sub. No. 6, which authorized the issuance to plaintiff of a certificate of public convenience and necessity to engage in interstate or foreign commerce as a common carrier by motor vehicle, covering operating authority previously applied for by Louis Tolson, the purchase of which by plaintiff had been authorized, with no restrictions as to the type of motor common carrier service. On April 18, 1942, the Commission granted to plaintiff a certificate of public convenience and necessity bearing number MC 89913 Sub. No. 6, including inter alia the operating rights purchased from Tolson, which certificate contained no restriction as to the type of motor common carrier service authorized thereunder.

13. In July 1941, prior to the issuance of the certificates of public convenience and necessity in Cooper, Parker, Hamm and Tolson, competing motor carriers filed complaints with the Commission, alleging that plaintiff was operating a motor carrier service independent of its parent railroad's rail service and in

contravention of the condition imposed by the Commission in the finance hearings. After appropriate proceedings, the Commission concluded in 1946 that plaintiff was not operating in violation of the terms of its certificates (46 M. C. C. 222). The Commission's opinion indicated that the ruling should not be taken as sanctioning such operation since the proceedings pursuant to which the Hamm, Cooper, Parker, and Tolson certificates were issued to plaintiff had been reopened for further hearing.

14. The proceedings which resulted in the Commission's order of December 7, 1953, had their beginning on January 4, 1945, when the Commission entered an order reopening for reconsideration the proceedings by which plaintiff acquired the Hamm, Cooper, Parker, and Tolson certificates.

15. On April 8, 1946, such reopened proceedings were heard by a hearing Examiner. During that hearing, the hearing Examiner made the following statement:

> Well, it is my assumption that if the Commission finds that restrictions are desirable, and if it concludes that it has authority to impose them at this time, they will put in restrictions similar to the so-called Kansas City Southern restrictions, including the condition 3, naming either key points or requiring an immediately prior or immediately subsequent rail haul. * * * In other words, I want information on which we can impose a workable restriction (59 of Transcript).

16. On May 17, 1948, a recommended report and order on further hearing was filed by Examiners William T. Croft and Beverly S. Simms.

17. After exceptions were filed, Division 5 of the Commission issued its report on further hearing on October 22, 1951. This report appears in 53 M. C. C. 415.

18. After plaintiff filed a petition for reconsideration of the report of Division 5, the Commission reopened the proceedings for oral argument, and after such argument, the Commission modified the report of Division 5 by its report of December 7, 1953, which appears in 62 M. C. C. 367. The order under attack was entered pursuant to this report.

19. Plaintiff's petition for reconsideration of this report and order was filed on February 2, 1954, and was denied by the Commission on April 4, 1955.

20. Plaintiff filed this suit on May 20, 1955, and on the same date a temporary restraining order was entered which enjoined the enforcement of the order of December 7, 1953, and the order of April 4, 1955.

21. The facts as to the various steps in the handling of this case beginning in 1938 and extending through the issuance of the certificates in 1942, as stated in findings of fact 6–13 inclusive herein, do not support the Commission's finding that such certificates were issued in their unrestricted form as a result of a clerical error or errors. Rather, a complete examination of the record fails to disclose any evidence that a clerical error in fact existed in the issuance of the certificates in question.

22. There was no evidence of record before the Commission which could be used as a basis for finding that a clerical error existed in the issuance of plaintiff's certificates bearing numbers MC 89913 Sub. No. 1, MC 89913 Sub. No. 3, MC 89913 Sub. No. 5 and MC 89913 Sub. No. 6.

Conclusions of Law

1. This is an action to enjoin, set aside, suspend, and annul an order of the Interstate Commerce Commission entered on December 7, 1953 (62 M. C. C. 367), which order purports to cancel certain operating certificates of plaintiff and at the same time issue new or amended certificates.

2. This Court has jurisdiction of the subject matter of this action, 28 U. S. C. A., Sec. 1326, and the case was heard by a Court composed of three judges pursuant to 28 U. S. C. A., Sec. 2321–2325.

3. Since the Commission did not order the cancellation or modification of the certificate bearing number MC 89913 Sub. No. 2 (Rose), no action by this Court is necessary in connection with the certificate bearing that number.

4. The Commission's action with respect to the certificate bearing number MC 89913 Sub. No. 10 (Bennett) was within its powers in view of the reservation of the power to impose additional restrictions on the scope of activities permitted under the certificate, and hence, under the rule of *United States* v. *Rock Island Motor Transit Co.*, 340 U. S. 419, rehearing denied 341 U. S. 906, the Commission's action with regard to that certificate is affirmed and no injunction should issue as to that part of the order.

5. Plaintiff's certificates bearing the numbers MC 89913 Sub. No. 1 (Hamm); MC 89913 Sub. No. 3 (Cooper); MC 89913 Sub. No. 5 (Parker); MC 89913 Sub. No. 6 (Tolson) were duly issued.

6. The granting of a motor carrier certificate by the Commission marks the end of the proceeding, just as the entry of a final judgment or decree marks the end of a court proceeding. *Smith Bros. Revocation of Certificate*, 33 M. C. C. 465, 472.

7. Motor carrier certificates duly issued cannot be modified in the mann r in which plaintiff's certificates in this case were sought to be modified by the Commission, even though some prior report indicates the contrary. *Watson Brothers Transportation Company* v. *U. S.*, 135 F. S. 905 (affirmed 350 U. S. 927).

8. Section 212–(a) of the Interstate Commerce Act, 49 U. S. C. A. Section 312–(a), sets forth the only

basis for revocation of a motor carrier certificate as follows:

> Certificates, permits, and licenses shall be effective from the date specified therein, and shall remain in effect until suspended or terminated as herein provided. Any such certificate, permit, or license may, upon application of the holder thereof, in the discretion of the Commission, be amended or revoked, in whole or in part, or may upon complaint, or on the Commission's own initiative, after notice and hearing, be suspended, changed, or revoked, in whole or in part, for willful failure to comply with any provision of this part, or with any lawful order, rule, or regulation of the Commission promulgated thereunder, or with any term, condition, or limitation of such certificate, permit, or license: *Provided, however,* That no such certificate, permit, or license shall be revoked (except upon application of the holder) unless the holder thereof willfully fails to comply within a reasonable time, not less than thirty days, to be fixed by the Commission, with a lawful order of the Commission, made as provided in section 204 (c), commanding obedience to the provision of this part, or to the rule or regulation of the Commission thereunder, or to the term, condition, or limitation of such certificate, permit, or license, found by the Commission to have been violated by such holder * * *.

9. The action taken by the Commission in cancelling the Hamm, Cooper, Parker, and Tolson certificates on the ground that said certificates were "inadvertently issued", is an attempt made contrary to Section 212 of the Interstate Commerce Act to revoke or change a certificate duly issued, and is more than the mere correction of a clerical error.

10. Orders of the Interstate Commerce Commission must be supported by adequate evidence. *Lang Trans-*

portation Corp. v. *U. S.*, 75 F. S. 915, 924; *Eastern Central Motor Carriers Assn.* v. *U. S.*, 321 U. S. 194; *Baltimore & Ohio Railroad Company* v. *U. S.*, 264 U. S. 258; *Florida* v. *U. S.*, 282 U. S. 194.

11. The finding in the order of December 7, 1953, that the Hamm, Cooper, Parker, and Tolson certificates were "inadvertently issued" is without adequate support in the evidence.

12. Clerical errors must be readily apparent, and the alleged clerical errors in this case are not apparent.

13. Failure by the Commission to follow Examiner's proposd report is not a sufficient showing to prove that a clerical error existed.

14. The issuance of compliance orders as found in findings of fact 9, 10, 11 and 12, and the existence of a pending complaint challenging plaintiff's right to operate over these certificates as found in finding of fact 13, together with the statement by the hearing Examiner as found in finding of fact 21, and the issuance in 1940 of a restricted certificate in connection with plaintiff's Bennett purchase, negate the existence of clerical error in the issuance of the Hamm, Cooper, Parker and Tolson certificates, and compel the conclusion that no clerical error existed in the issuance of those certificates.

15. The Commisison's order of December 7, 1953, as it applies to plaintiff's certificates bearing numbers MC 89913 Sub. No. 1, MC 89913 Sub. No. 3, MC 89913 Sub. No. 5 and MC 89913 Sub. No. 6, should be enjoined, set aside, suspended and annulled because said order is contrary to the provisions of Section 212 (a) of the Interstate Commerce Act, 49 U. S. C. A. Section 312 (a).

16. In addition, because the Commission's finding that said certificates were issued as a result of clerical

error is without the support of adequate evidence, the order of December 7, 1953, as it applies to the certificates described in conclusion of law 15, should be enjoined, set aside, suspended and annulled.

17. Either of the reasons stated in conclusions of law 15 or 16 would be sufficient in and of itself to require that the order be enjoined, set aside, suspended and annulled.

18. Because of our conclusion as stated in conclusion of law 15, it has not been necessary for us to consider the additional evidence offered by plaintiff at the hearing before this Court. Our consideration has been limited to the record made before the Commission beginning with the January 4, 1945 order reopening for reconsideration the proceedings by which plaintiff acquired the Hamm, Cooper, Parker, Tolson, Rose and Bennett certificates, in accordance with the well-established principle that "* * * the validity of the order [of the Interstate Commerce Commission] must be determined upon evidence introduced before the Commission." *Louisville & Nashville Railroad Company* v. *United States,* 245 U. S. 463, 466. This principle requires that we give no consideration to matters not in the record before the Commission, but even were it proper for us to take into consideration matters such as those tendered by the Interstate Commerce Commission at the hearing before this Court, our conclusions as stated in conclusions of law 15 and 16 would not be different.

19. A permanent injunction should issue enjoining the enforcement of the provisions of the December 7, 1953, order as it applies to plaintiff's certificates bearing the numbers MC 89913 Sub. No. 1; MC 89913 Sub. No. 3; MC 89913 Sub. No. 5 and MC 89913 Sub. No. 6.

20. No injunction should issue in connection with said order as it applies to plaintiff's certificate bearing the number MC 89913 Sub. No. 10.

(s) MARTIN D. VAN OOSTERHOUT,
United States Circuit Judge.

(s) ROY W. HARPER,
United States District Judge.

GEORGE H. MOORE,
United States District Judge, dissenting.

APPENDIX C

Statute Involved

National Transportation Act of 1940 (49 U. S. C., 1 et seq.)

National Transportation Policy (49 U. S. C., preceding sections 1, 301, 901, and 1001):

> It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense.

Interstate Commerce Act (49 U. S. C. 1 *et seq.*):

> SEC. 5 (2). (a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—
>
> (i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the own-

ership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

SEC. 5 (2). (b) Whenever a transaction is proposed under subparagraph (a), the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 205 (e)), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable,

the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided,* That if a carrier by railroad subject to this part, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6), is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

SEC. 212. (a) Certificates, permits, and licenses shall be effective from the date specified therein, and shall remain in effect until suspended or terminated as herein provided. Any such certificate, permit, or license may, upon application of the holder thereof, in the discretion of the Commission, be amended or revoked, in whole or in part, or may upon complaint, or on the Commission's own initiative, after notice and hearing, be suspended, changed, or revoked, in whole or in part, for willful failure to comply with any provision of this part, or with any lawful order, rule, or regulation of the Commission promulgated thereunder, or with any term, condition, or limitation of such certificate, permit, or license: *Provided, however,* That no such certificate, permit, or license shall be revoked (except upon application of the holder) unless the holder thereof willfully fails to comply, within a reasonable time, not less than thirty days, to be fixed by the Commission, with a lawful order of the Commission, made as provided in section 204 (c), commanding obedience to the provision of this part, or to the rule or

regulation of the Commission thereunder, or to the term, condition, or limitation of such certificate, permit, or license, found by the Commission to have been violated by such holder: *And provided further,* That the right to engage in transportation in interstate or foreign commerce by virtue of any certificate, permit, license, or any application filed pursuant to the provisions of sections 206, 209, or 211, or by virtue of the second proviso of section 206 (a) or temporary authority under section 210a, may be suspended by the Commission, upon reasonable notice of not less than fifteen days to the carrier or broker, but without hearing or other proceedings, for failure to comply, and until compliance, with the provisions of sections 211 (c), 217 (a), or 218 (a) or with any lawful order, rule, or regulation of the Commission promulgated thereunder.

SEC. 213. (a) (1) [49 U. S. C. Section 313 (a) (1)] Whenever a consolidation, merger, purchase, lease, operating contract, or acquisition of control is proposed under this section, the carrier or carriers or the person seeking authority therefor shall present an application to the commission, and thereupon the commission shall, after such notice as is required by section 205 (f) and if deemed by it necessary in order to determine whether the findings specified below may properly be made, set said application down for public hearing. If the commission finds that the transaction proposed will be consistent with the public interest and that the conditions of this section have been or will be fulfilled, it may enter an order approving and authorizing, such consolidation, merger, purchase, lease, operating contract, or acquisition of control, upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe: *Provided, however,* That if a carrier as

defined in section 1 (3) or Part I, or any person which is controlled by such a carrier or affiliated therewith within the meaning of section 5 (8) of this title, is an applicant, the commission shall not enter such an order unless it finds that the transaction proposed will promote the public interest, enabling such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

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